IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIOLETTA HOANG, et al.,

Plaintiffs,

v.

REUNION.COM, INC.,

Defendant

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No. C-08-3518 MMC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

Before the Court is defendant Reunion.com, Inc.'s motion, filed November 7, 2008, to dismiss plaintiffs' First Amended Complaint ("FAC"). Plaintiffs Violetta Hoang ("Hoang"), Livia Hsiao ("Hsiao"), Michael Blacksburg ("Blacksburg"), and Matthew Hall ("Hall") have filed opposition, to which defendant has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

By order filed October 6, 2008, the Court dismissed plaintiffs' initial complaint, by which plaintiffs alleged claims under § 17529.5(a) of the California Business & Professions Code. Specifically, the Court found that plaintiffs' claims, as alleged, were barred by the preemption clause set forth in 15 U.S.C. § 7707(b)(1), which preempts state laws regulating commercial emails, except to the extent such state laws prohibit "falsity or deception in any portion of a commercial electronic mail message or information attached

[1]By order filed December 16, 2008, the Court took the matter under submission.

thereto." See 15 U.S.C. § 7707(b)(1). The Court afforded plaintiffs leave to amend to allege a common law fraud claim and/or § 17529.5(a) claims that occurred under circumstances involving falsity or deception. Plaintiffs thereafter filed the FAC, and allege therein three claims under § 17529.5(a). Defendant argues that the FAC is subject to dismissal, for the reason plaintiffs have failed to allege a § 17529.5(a) claim that is not preempted by § 7707(b)(1).

A. First Cause of Action

In the First Cause of Action, plaintiffs allege, on behalf of plaintiffs Blacksburg and Hall, a violation of § 17529.5(a)(1), which prohibits the sending of a commercial email advertisement that "contains or is accompanied by a third-party's domain name without the permission of the third party." See Cal. Bus. & Prof. Code § 17529.5(a)(1).

Plaintiffs allege that defendant sent an email to Blacksburg and an email to Hall, each of which included, at the end of the "From" line, a third-party domain name, and that neither the referenced third-party nor its licensee had given defendant permission to use the domain name in the email. (See FAC ¶¶ 7, 47, 52.) Specifically, according to plaintiffs, defendant sent Blacksburg an email that stated it was from "edmorphic@yahoo.com", (see FAC ¶ 43), and sent Hall an email that stated it was from "mikeklumpp@yahoo.com," (see FAC ¶ 48).

Contrary to defendant's argument, plaintiffs have sufficiently alleged, for purposes of § 7707(b)(1), that defendant's inclusion of a third-party's domain name in the subject emails was a false representation and that defendant knew such emails would convey a false representation, in that, according to plaintiffs, the emails were not sent by the yahoo.com addressees identified in the email or with their permission, but, rather, were sent by defendant, which authored the entirety of the language in the email. (See FAC ¶¶ 7, 9, 33, 45, 50.) Further, plaintiffs have sufficiently alleged the above-referenced representations were material and defendant intended the recipients to rely thereon, in that, according to plaintiffs, defendant intended the recipients to believe the emails had been authored and sent by the individuals whose yahoo.com email addresses were

identified and to act on such belief by "opening and reading" the emails, which, in fact, contained a commercial advertisement for defendant's services. (See FAC ¶¶ 45, 47, 51, 52.)

As defendant points out, however, plaintiffs fail to allege that either Blacksburg or Hall, the plaintiffs on whose behalf the claim is brought, incurred any damage as a result of having relied on such asserted false statement. Plaintiffs, essentially conceding the FAC fails to include any such allegation(s), argue the Court should reconsider its October 6, 2008 order to the extent the Court found therein that each of the plaintiffs, in order to state a claim, must allege that he or she suffered damage as a result of his or her having relied on a false or misleading statement made by defendant.

Plaintiffs do not dispute that a common law claim for misrepresentation or fraud requires a plaintiff to establish he suffered some injury or incurred damage as a result of his having relied on a false or misleading statement. Rather, plaintiffs argue, § 7707(b)(1) exempts from preeemption state statutes prohibiting the making of false or misleading statements in a commercial email, irrespective of whether the plaintiff incurred damage as a result of his having relied on such a statement.[2] In support of such argument, plaintiffs point to the text of § 7707(b)(1), which does not explicitly refer to "misrepresentation" or "fraud" but, rather, to "falsity or deception." Courts that have considered the issue, however, have interpreted "falsity or deception," as used in § 7707(b)(1), to refer to the common law tort of misrepresentation or fraud. See, e.g., Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348, 354 (4th Cir. 2006) (interpreting preemption clause in § 7707(b)(1) as referring to "torts involving misrepresentations"); Ferron v. Echostar Satellite, LLC, 2008 WL 4377309, *6 (S.D. Ohio 2008) (finding, in action where plaintiff alleged violation of state statute regulating commercial email, defendant entitled to summary judgment where plaintiff failed to offer evidence "to support a fraud claim" and thus failed to avoid preemption under § 7707(b)(1)); ASIS Internet Services v. Optin Global,

[2]Plaintiffs fail to explain why § 17529.5(a) is properly interpreted as providing a remedy even where the plaintiff has incurred no damage.

Inc., 2008 WL 1902217, *19 (N.D. Cal. 2008) (holding § 7707(b)(1) "permits state law to regulate the use of electronic messages only to the extent those regulations are based on traditional principles of fraud"); Kleffman v. Vonage Holdings Corp., 2007 WL 1518650, *3 (C.D. Cal. 2007) (holding Congress, in enacting § 7707(b)(1), "left states room only to extend their traditional fraud prohibitions to the realm of commercial emails"; finding claim for violation of § 17529.5(a) preempted, where claim not based on "traditional tort theory" of "fraud and deceit" and plaintiff failed to allege he was "at any point mislead").

The findings in such cases are supported by the relevant legislative history. In particular, the Senate Report on the "CAN-SPAM Act of 2003" describes the purpose of § 7707(b)(1) as follows:

> Section [7707] (b)(1) sets forth the general rule concerning the preemption of State law by the legislation. The legislation would supersede State and local statutes, regulations, and rules that expressly regulate the use of e-mail to send commercial messages except for statutes, regulations, or rules that target fraud or deception in such e-mail. Thus, a State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted. Given the inherently interstate nature of e-mail communications, the Committee believes that this bill's creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce that is essential to resolving the significant harms from spam faced by American consumers, organizations, and businesses throughout the United States. This is particularly true because, in contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which State law to comply. Statutes that prohibit fraud and deception in e-mail do not raise the same concern, because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.

See S. Rep. No. 108-102, at 21-22 (2003), reprinted in 2004 U.S.C.C.A.N. 2348, 2365 (emphasis added).

In any event, even assuming, arguendo, Congress did not intend to preempt state laws that provide a cause of action for false emailed statements upon which the plaintiff did not rely to his detriment, a claim based on such a state law could not be brought in federal court. For purposes of federal standing, a plaintiff must allege, and thereafter prove, that he incurred an injury as a result of the defendant's conduct. See Lujan v. Defenders of

Wildlife, 504 U.S. 555, 560-61 (1992) (holding "standing is an essential and unchanging part of the case-or-controversy requirement of Article III"; further holding that a plaintiff, to establish standing, "must have suffered an injury in fact").[3]

Accordingly, plaintiffs cannot proceed with their claim under § 17529.5(a)(1) on behalf of plaintiffs Blacksburg and Hall, in the absence of an allegation that each such plaintiff incurred some type of injury or damage as a result of his having taken action in reliance on defendant's assertedly false use of a third-party domain name in the email. Because plaintiffs fail to make such an allegation, the First Cause of Action is subject to dismissal.

The Court next considers whether further leave to amend the First Cause of Action is appropriate. The FAC includes allegations by which plaintiffs suggest that a person who receives a commercial email that falsely uses a third-party domain name, and who opens and reads such email in reliance on the sender's use of the third-party domain name, as opposed to having summarily deleted it as junk mail, has incurred damage in the form of his having expended time to read the email and consider its content. (See FAC ¶ 3, 46, 49, 51.) Although plaintiffs do not allege that either Blacksburg or Hall in fact relied on the emails in question, the Court will afford plaintiffs one further opportunity to amend, to allege facts that each plaintiff on whose behalf the First Cause of Action is brought incurred such injury or other assertedly cognizable injury as a result of his having relied on defendant's

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[3]Hart v. McLucas, 535 F. 2d 516 (9th Cir. 1976), on which plaintiffs rely, is distinguishable. In that case, the government sought to suspend a flight instructor's certificate in light of the instructor's alleged violation of a regulation prohibiting instructors from making an "intentionally false statement" on a specified government form. The issue presented was whether the government had to prove the instructor had "knowledge of [the] falsity" of the statement. See id. at 519. In answering that question in the affirmative, the Ninth Circuit also observed that the government need not prove the government acted "in reliance upon the representation." See id. Hart contains no language suggesting, however, that a private party seeking to establish a claim based on a false statement need not establish an injury. Indeed, any such interpretation would be wholly at odds with Supreme Court precedent. See Lujan, 504 U.S. at 560.

allegedly false use of a third-party's domain name.[4]

B. Second Cause of Action

In the Second Cause of Action, plaintiffs allege, on behalf of each named plaintiff, a violation of § 17529.5(a)(2), which prohibits the sending of a commercial email advertisement that "contains or is accompanied by falsified, misrepresented, or forged header information." See Cal. Bus. & Prof. Code § 17529.5(a)(2).

Plaintiffs allege defendant sent each plaintiff an email that "falsely represented" such email "had been sent from an individual, rather than from [defendant]." (See FAC ¶ 79.) Specifically, plaintiffs allege that Hoang received from defendant an email stating it was "From: Truong Tran," (see ¶ FAC 34), Hsiao received from defendant three emails stating they were, respectively, "From: Esther Kang," "From: Vivian Yeh," and "From: Andrea Wong," (see FAC ¶ 38), Blacksburg received from defendant an email stating it was "From: Erick Dunn," (see FAC ¶ 43), and Hall received from defendant an email stating it was "From: Mike Klumpp," (see FAC ¶ 48).

Contrary to defendant's argument, plaintiffs have sufficiently alleged, for purposes of § 7707(b)(1), that defendant's inclusion of an individual's name, immediately next to the word "From" in each of the above-referenced emails was a false representation and that defendant knew it would convey a false representation, in that, according to plaintiffs, the emails were not sent by the named individuals, but were actually sent by defendant, which authored the entirety of the language in the e-mail. (See FAC ¶¶ 9, 33, 35, 40, 45, 51.) Further, plaintiffs have sufficiently alleged the above-referenced asserted false representations were material and defendant intended the recipients to rely thereon, in that, according to plaintiffs, defendant intended the recipient to believe the email had been authored and sent by the named individual and to act on such belief by "opening and reading" the emails, which, in fact, contained a commercial advertisement for defendant's

[4]Because plaintiffs have neither alleged their actual theory of damages, nor identified it in their opposition, the Court does not consider whether any particular claim of loss or harm, if alleged, would be sufficient for pleading purposes.

services. (See FAC ¶¶ 35, 40, 45, 51.)

Plaintiffs, however, have failed to allege that any of the four plaintiffs actually incurred an injury as a result of his or her having taken some action in reliance on defendant's asserted use of false header information; for the same reasons as discussed above, plaintiffs must include such allegation(s) in order to state a claim.

Accordingly, the Second Cause of Action is subject to dismissal.

Again, the Court will afford plaintiffs one further opportunity to amend, in this instance, to allege facts that each plaintiff on whose behalf the Second Cause of Action is brought incurred a cognizable injury as a result of his or her having relied on defendant's use of assertedly false header information.

C. Third Cause of Action

In the Third Cause of Action, plaintiffs allege, on behalf of each named plaintiff, a violation of § 17529.5(a)(3), which prohibits the sending of a commercial email advertisement that "has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message." See Cal. Bus. & Prof. Code § 17529.5(a)(3).

Plaintiffs allege defendant sent each plaintiff an email with a subject line defendant knew was likely to lead each plaintiff to believe he/she was receiving a communication from an individual known to such plaintiff, rather than a commercial email authored and sent by defendant. Specifically, plaintiffs allege (1) the email Hoang received, which stated it was "From: Truong Tran," also stated "Subject: Truong wants to connect with you!," (see FAC ¶ 34), (2) the emails Hsiao received, which stated they were, respectively, "From: Esther Kang," "From: Vivian Yeh," and "From: Andrea Wong," also stated, respectively, "Subject: Esther wants to connect with you!," "Subject: Vivian wants to connect with you!," and "Subject: Andrea wants to connect with you!," (see FAC ¶ 38), (3) the email Blacksburg received, which stated it was "From: Erick Dunn," also stated "Subject: [Fool'd]

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Please contact with me :)," (see FAC ¶ 43),[5] and (4) the email Hall received, which stated it was "From: Mike Klumpp," also stated "Subject: Please connect with me :)," (see FAC ¶ 47).

Contrary to defendant's argument, plaintiffs have sufficiently alleged, for purposes of § 7707(b)(1), that the above-quoted subject lines were false representations, because, according to plaintiffs, none of the individuals identified wanted to "connect" with the plaintiff to whom defendant sent the email, (see FAC ¶¶ 9, 35, 39, 46, 51), and defendant knew its representation was false because defendant "generated" the subject line "without providing the [individual identified in the email] any input or opportunity to review or approve the message before it was sent," (see FAC ¶ 9). Rather, according to plaintiffs, such individuals provide defendant with the passwords to their email accounts, (see FAC ¶¶ 26-28), and defendant, in its "Privacy Policy," has disclosed only that defendant would "access" that "member's [email] contacts for the purpose of sending emails 'from Reunion.com' to certain or all of those contacts and 'inviting those contacts to join' Reunion.com," (see FAC ¶ 28).[6] At this stage of the proceedings, the Court cannot find that the scope of the authorization set forth in the Privacy Policy is or is not sufficiently broad to encompass the particular communications at issue herein.

Further, plaintiffs have sufficiently alleged the above-referenced asserted false representations were material and defendant intended the recipients to rely thereon, in that, according to plaintiffs, defendant intended the recipients to believe, based on the

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[5]According to plaintiffs, "FOOLD" is the name of a "Google electronic mailing list" to which both Blackburg and Erick Dunn are "subscribers." (See FAC ¶ 42.)

[6]Defendant requests the Court take judicial notice of "screen captures" that, according to defendant, its members who provided email contacts to defendant would have seen on particular dates. For example, according to defendant, on May 5, 2008, such members were advised that if they provided email contacts, defendant would "let anyone who isn't a [m]ember know that [the member] looked for them," (see Baird Decl., filed November 7, 2008, Ex. 1), and that, between July 17, 2008 and July 25, 2008, such members were advised, "We'll let your contacts who aren't [m]embers know that you want to connect," (see id. Ex. 2). Because the FAC does not purport to rely on the contents of those "screen captures," and does not allege that the members identified in the subject emails provided email contacts on May 5, 2008 or between July 17, 2008 and July 25, 2008, the Court declines to take judicial notice of such evidence at the pleading stage.

content of the subject line, that the emails were of a "personal nature and not an unsolicited commercial email from [defendant]," (see FAC ¶ 5), and to act on such belief by "opening and reading" the emails, which, in fact, contained a commercial advertisement for defendant's services, (see FAC ¶¶ 32, 37, 41, 46, 51.)

Plaintiffs, however, have again failed to allege that any of the four plaintiffs actually incurred an injury as a result of his or her having taken some action in reliance on defendant's asserted use of a misleading subject line, and, as discussed above, plaintiffs must include such allegation(s) in order to state a claim.

Accordingly, the Third Cause of Action is subject to dismissal.

As with plaintiffs' other claims, the Court will afford plaintiffs one further opportunity to amend, in this instance to allege facts that each plaintiff on whose behalf the Third Cause of Action is brought incurred a cognizable injury as a result of his or her having relied on defendant's use of an assertedly misleading subject line.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss is hereby GRANTED, and the First Amended Complaint is hereby DISMISSED with leave to amend to cure the deficiencies identified above. Any such Second Amended Complaint shall be filed no later than January 16, 2009.

IT IS SO ORDERED.

Dated: December 23, 2008

MAXINE M. CHESNEY
United States District Judge